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of any allegation that the mortgage effected by the plaintiff's husband was not for the family advantage, or was in any way in fraud of her rights, we are of opinion that the purchaser at the Court sale took the house free from her right of residence as a Hindu widow. This appears to have been decided by this Court in *Náná Jivan* v. *Ramá*[1] and at Madras in *Ramanadan* v. *Rangammal*[2]. The subject is also discussed in *Lakshman* v. *Satyabhamabái* [3] and in *Dalsukhrám* v. *Lallubhai* [4].

For these reasons we reverse the decree of the District Judge and restore that of the Subordinate Judge. Plaintiff to pay costs of both appeals.

Decree reversed.

(1) P. J., 1886, p. 252.
(2) 1. L. R., 12 Mad., 260.
(3) I. L. R., 2 Bom., 494, at pp. 511, 514, 580.
(4) I. L. R., 7 Bom., 282.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1892. *March* 10.

BAI UGRI AND OTHERS, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* PÁTEL PURSHÓTTAM BHUDAR, (ORIGINAL PLAINTIFF), RESPONDENT.*

Husband and wife—Marriage—Restitution of conjugal rights—Conditional marriage—Kudwa Kunbi caste—Custom—Public policy.

The plaintiff, a member of the Kudwa Kunbi caste, sued in 1890 for restitution of conjugal rights, alleging that he had been married to the first defendant in 1927. The defendants alleged that at the date of the marriage the parties were only a month old; that the marriage was a *sata* (exchange) marriage, and that by the contract the plaintiff's father was bound, as a condition of his obtaining the second defendant's daughter for his son, to provide a girl to be married to the second defendant's son. They alleged that such conditional marriages were a custom of the caste, and they denied that the condition had been performed by the plaintiff's father. They further alleged that in 1936 the plaintiff's father, finding that he could not perform the condition, had passed a release (the plaintiff himself then being a minor) to defendant No. 2 (the father of defendant No. 1) giving up all claims to defendant No. 1; that a dispute having subsequently arisen after the plaintiff had attained his majority the matter was referred to the members of the caste, who decided that within a certain fixed time the plaintiff should provide a girl for the son of defendant No. 2, and that on the plaintiff failing to do so the marriage was dissolved. The Court found that by the custom of the caste the marriage in 1927 between the plaintiff and defendant No. 1 was only a conditional marriage; that the release of 1936 operated to cancel the marriage, and that in any case the plaintiff's failure to find a girl for the second defendant's son, in accordance with the decision of the caste, dissolved the marriage.

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Held, that the plaintiff had not established his right to the restitution of defendant No. 1 as his wife. The alleged custom was not contrary to public policy. According to the custom relied on, there was no complete and binding marriage within the intention of the parents of the parties although the ordinary religious ceremonies were performed. Such a transaction could not be regarded as immoral from any point of view.

The Hindu law leaves it entirely to the parents to marry their daughters, and although, according to strict Brahmanical law, a marriage is complete when the religious ceremony has been performed, there would seem to be no sufficient reason for refusing to recognise a custom, at any rate among the lower castes, by which such transactions, rendered necessary by the paucity of women in the caste, although performed with religious ceremonies, are still regarded by the parents on both sides as incomplete and conditional marriages.

THIS was a second appeal from the decision of Ráo Bahádur Chunilál Máneklál, First Class Subordinate Judge of Ahmedabad with appellate powers.

Suit for restitution of conjugal rights. Defendant No. 1 was the daughter of the second defendant, and the plaintiff alleged that he was married to defendant No. 1 in 1927 (1871-72) by a *sata* (exchange) contract of marriage. By this contract he received defendant No. 1 in marriage from her father (defendant No. 2) and in return his (the plaintiff's) father was to provide a girl to be given in marriage to the son of defendant No. 2. The plaintiff further stated that in accordance with this twofold contract the son of defendant No. 2 was married to a girl provided by the plaintiff's father, and the plaintiff was married to defendant No. 1.

The girl married to the son of defendant No. 2 died soon after the marriage, and thereupon defendant No. 2 refused to send his daughter, (defendant No. 1,) to the house of her husband (the plaintiff) unless another girl was provided by his (plaintiff's) father for the defendant's son. The dispute was referred to the members of the caste in *Samvat* 1942 (A. D. 1886-87), and they decided that the plaintiff within a certain time should offer another girl to defendant No. 2 for his son, and that when the offer was made defendant No. 2 should pay Rs. 125 to the plaintiff, and should send defendant No. 1 to his house. The plaintiff complained that, as required, he had offered a girl to defendant No. 2, who had, however, refused to accept her, and had also refused to pay the Rs. 125 and to send defendant No. 1 to his house. The plaintiff accordingly filed this suit. The first defendant had been

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given in marriage by her father (defendant No. 2) to the third defendant.

For the defence it was alleged that the plaintiff and the first defendant were married in *Samvat* 1927, when they were only a month old; that the contract of marriage was twofold; that no girl had ever been offered by the plaintiff's father to the second defendant for marriage to his son; that as the plaintiff's father had not performed, and could not perform, his part of the contract, he, in *Samvat* 1936 (1880-81 A.D.), had given a release, (the plaintiff then being a minor) to the second defendant, stating therein that he had no longer any claim on the first defendant; that the plaintiff, however, when he came of age, claimed possession of the first defendant; that the matter was, therefore, referred to arbitrators in *Samvat* 1942 (A.D. 1886-87), who decided that the plaintiff should offer a girl within a certain time to the second defendant and then take away the first defendant to his house; but that, in case the plaintiff should fail to do this within the time, the second defendant should be at liberty to give the first defendant in marriage to any other person. The defendants alleged that the plaintiff had failed to perform his part under this award, and that thereupon the first defendant had been given in marriage to the third defendant.

The Subordinate Judge rejected the plaintiff's claim. In his judgment he said: "It appears that *bekhla*, *tekhla* and *chokhla* (*i. e.* double, treble and quadruple contracts) are common among Kunbis in the district, and those of moderate means seem to indulge most in such contracts. This may perhaps be due to the scarcity of girls. And as marriages take place every nine, ten or twelve years, child marriages are very common, but the married girls are sent to their husbands' houses only when they become of marriageable age, and several circumstances sometimes take place before the girl reaches her marriageable age to be sent to her husband's house, which bring about annulment of the marriage contract. . . . . The defendant No. 1 has never gone or has never been sent to the plaintiff's house. They have hitherto never lived as husband and wife. Since her marriage with defendant No. 3, the defendant No. 1 has been living in his house as his wife. Under such circumstances I think that the plaintiff is not entitled to recover possession of the defendant No. 1 to live with him as his wife.

"It seems to me that until the girls reach their marriageable age among Kunbis, child marriages in them are more like betrothal and less like *pakka* marriages, especially when such marriages are effected according to the double, treble and quadruple contract arrangement."

In appeal, the Court reversed the decree. The defendants thereupon preferred a second appeal.

Govardhanrám M. Tripathi for the appellants:—The plaintiff is not entitled to a decree for restitution of conjugal rights. His marriage was a conditional one, and as the conditions were not fulfilled, the marriage was never completed. These conditional marriages are a custom among the Kudwa Kunbi caste to which the parties belong. The custom is not immoral or opposed to public policy—*In the matter of Chamia* (1). Such a marriage is called A'sura, and is only an inchoate one.

Ganpat Sadáshiv Ráo for the respondent:—The marriage in this case does not fall within the class of marriages called A'sura. A marriage is complete as soon as the requisite ceremonies are performed, and it cannot then be set aside. Where a marriage is made subject to a condition, a Court should uphold the marriage and set aside the condition—*Sectaram, alias Kerra Heera* v. *Mussamut Aheeree Heeranee* (2). The essential condition of the marriage in the A'sura form is the payment of money. But the validity of a marriage is not affected by failure of a contract to pay money—Steele's Hindu Law and Custom, page 166. The Hindu law regards marriage as an indissoluble tie—West and Bühler, (3rd Ed.), page 90. A custom dissolving marriage is immoral and should not be given effect to—*Mathura Náikin* v. *Esu Náikin* (3). The custom of providing a wife for the son of a man whose daughter is married, cannot be supported on the ground of public policy.

At this stage of the case the Court recorded the following interlocutory judgment:—

(1) 7 Calc. L. R., 354. (2) 2 W. R., 40.

(3) I. L. R., 4 Bom., 545.

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1891, *September* 28. SARGENT, C. J.:—The judgment of the lower Court of appeal shows that the Subordinate Judge., A. P., assumes that the plaintiff was validly married to defendant No. 1, and upon that assumption he holds that a custom of the caste "for the father to divorce his son's wife, although the son was a minor, was immoral and contrary to public policy." But it appears to us that a doubt necessarily arises as to the effect of a *sata* (exchange) marriage, as contracted according to the custom of the caste; for it is needless to say that such a contract of marriage is not known to the strict Hindu law. In other words, it has to be determined whether, according to the custom of the caste, what took place in *Samvat* 1927 constituted a complete valid marriage between the plaintiff and defendant No. 1 or whether the marriage remained inchoate or conditional upon the performance by the plaintiff's father of his part of the bargain, *viz.*, "to offer a girl to defendant No. 2 for marriage with his son."

Before disposing of the case on considerations arising out of public policy we think it is advisable that issues should be raised for determining the above question, and also whether by the custom of the caste the father could cancel what had been done in *Samvat* 1927 so as to bind the plaintiff. We must, therefore, send back the case for a finding on the following issues:—

1. Whether by the custom of the caste what took place in 1927 constituted a complete and unconditional marriage between plaintiff and the first defendant?

2. Whether the plaintiff's father by the custom of the caste could cancel what took place in 1927 so as to bind him?

The finding on the issues to be sent to this Court within three months. Parties to be allowed to give fresh evidence.

The findings of the Subordinate Judge on both the issues were in the affirmative. In his reasons for the findings, however, he stated that the marriage was complete, in the sense that all the necessary ceremonies were gone through, but that the custom of conditional marriage relied on by the appellant was proved.

The case then came again before the High Court.

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[SARGENT, C. J. :—Now the only question before us is whether we can recognize the custom.]

Ganpat Sadáshiv Ráo for the respondent (plaintiff) :—We rely upon the rulings in *Uji* v. *Hathi Lálu*(1), *Reg.* v. *Karsan Goja*; *Reg.* v. *Bái Rupa* (2) and *Reg.* v. *Sambhu Rághu* (3). The custom alleged is opposed to public morals and is also repugnant to the spirit of the Hindu law. The utmost that the caste could do was to inflict a fine upon the defaulting party for his failure to perform his part of the contract.

Govardhanrám M. Tripathi for the appellants :—According to the custom in dispute, a marriage is not allowed to be consummated, though all the necessary religious ceremonies are performed, till the husband has performed his part of the contract. It is not, therefore, complete. The performance of the ceremonies amounts to nothing more than betrothal. Therefore the custom cannot be treated as immoral or opposed to public policy, and, therefore, it should be recognized—*Boolchand Kollta* v. *Jánokee* (4).

SARGENT, C. J. :—The findings on the issues sent down by this Court on 28th September, 1891, are, when read together, to the effect that although the usual religious ceremonies were performed on the occasion, what took place in *Samvat* 1927 constituted, by the custom of the caste, only a conditional marriage between plaintiff and defendant No. 1; that the *farkhat*, passed by the father in *Samvat* 1936, and which was signed by the plaintiff, operated to cancel the marriage, but that, in any case, a dispute having arisen out of the said *farkhat*, the decision of the Panch that plaintiff should find a girl to be married to a male member of the family of defendant No. 2 was binding on him, and that the plaintiff's default in doing so dissolved the marriage.

It has, however, been contended that the Court ought not to recognize such a custom as being contrary to public policy. The cases which have been referred to, *viz.*, *Reg.* v. *Karsan Goja*; *Reg.* v. *Bái Rupa*(2), *Uji* v. *Hathi Lalu*(1) and *Reg.* v. *Sambhu Raghu*(3), all turn upon caste customs by which a woman is en-

(1) 7 Bom. H. C. Rep., A. C. J., 133.
(2) 2 Bom. H. C. Rep., 117.
(3) I. L. R., 1 Bom., 347.
(4) 25 W. R., 386.

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abled to leave her husband and marry another man of her own free will, or with the consent of the caste, and which the Court held to be invalid on the ground that they were immoral as "legalizing adultery." The question here is of an entirely different nature; as, according to the custom relied on, there is no complete and binding marriage within the intention of the parents of the parties, although the ordinary religious ceremonies (presumably those usual amongst Sudras) are performed. Such a transaction as took place in *Samvat* 1927 cannot, in our opinion, be regarded as immoral from any point of view. The parties are in all cases, according to the practice of the caste, of very tender years when such marriages are contracted. The Hindu law leaves it entirely to the parents to marry their daughters, and although, according to strict Brahmanical law, a marriage is complete when the religious ceremony has been performed, there would seem to be no sufficient reason for refusing to recognize a custom, at any rate amongst the lower castes, by which such transactions, rendered necessary by the paucity of women in the caste, although performed with religious ceremonies, are still regarded by the parents on both sides as incomplete and conditional marriages. In the case of *Boolchand Kollta* v. *Jánokee*[1], which was a suit like the present for restitution of conjugal rights, the Calcutta High Court gave effect to a caste custom by which the usual ceremony of marriage was not regarded as binding unless a second ceremony was performed prior to the woman coming to maturity and cohabiting with her husband, and by which, in default of such ceremony, the woman might, after puberty, as the defendant in that case had done, marry another man.

Upon the whole, we are of opinion that there is no reason for not recognizing the custom, as proved in this case, and, therefore, whether upon the ground of the *farkhat* passed by the plaintiff's father or of the plaintiff's default in performing the condition imposed on him by the Panch, we must hold that the plaintiff has not established his right to the restitution of the defendant No. 1 as his wife, and must, therefore, reverse the decree of the Court below and dismiss the plaint, with costs throughout on plaintiff.

Decree reversed.

(1) 25 W. R., 386.